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Cryovac, Inc.				
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/051,584
Filing Date: January 18, 2002
Appellant(s): VADHAR ET AL.

Mark B. Quatt
For Appellant

EXAMINER'S ANSWER

MAILED

JAN 11 2007

GROUP 1700

This is in response to the appeal brief filed 3/16/06 appealing from the Office action mailed 8/26/05.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,023,121	POCKAT et al.	6-1991
5,407,751	GENSKE et al.	4-1995
4,429,079	SHIBATA et al.	1-1984

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 23, 25-28 are rejected under 35 USC 102 (b) as being anticipated by Pockat et al. (US 5023121) as evidenced by Genske et al. (US 5407751).

Regarding claims 23,26-28, Pockat et al. teach placing a food product on a bottom web that comprises a sealant layer of 60-80% EVA and 10% Poly-propylene, which is a homopolymer of propylene, and an oxygen layer of EVOH as recited in claim 28, sealing a top web, which comprises an ethylene/alpha-olefin copolymer (i.e. LDPE and LLDPE) and an oxygen barrier such as nylon (i.e. polyamide) as recited in claim 27, to the bottom web that is attached to a support member, such as nylon (or polyamide as recited in claim 26), and drawing a vacuum to form a vacuum skin package that provides an easy peel seal (Column 3, line 49 to Column 3, line 28, Column 5, line 5 to column 6, line 22, the top web layers are defined in Column 7, lines 64-68 and Claim 2, the support layer is defined in Table 1, claim 1 and shown in Figure 4).

All of these materials are microwaveable evidenced by Genske et al. who also teach easy peel lid stock for microwaveable structures (Abstract, Column 2, lines 48-57, Coplumn 4, line 20 to Column 6, line 61). Note: the claim recites "a sealant layer consisting essentially of" the EVA and the homopolymer/copolymer PP. Section 2111.03 of the MPEP states "for the purposes of searching and applying prior art and absence a clear indication in the specification or claims of

what the basic and novel characteristics are, consisting essentially of is construed as equivalent to comprising. Thus, the claims do not exclude the polybutene disclosed in Pockat et al.

Regarding claim 25, the bottom web of skin package of Pockat et al. comprises

(i.e. has at least one) single layer adapted to be adhered to the sealant layer of the top web.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over-Pockat et al. (US 5023121) evidenced by Genske et al. (US 5407751) as applied to claims 23,25-28 above, further in view of Shibata et al. (US 4429079).

Pockat et al. teach the top web with a sealant layer comprising ethylene/alpha olefin copolymer, such as LDPE, and an outer gas-barrier layer of polyamide, but are silent in teaching ethylene/octene-1 polymer. Shibata et al. also teaches adhesive layers compatible with polyamides for food packages, but teaches some low-density

polyethylenes have shown various problems such as a very narrow seal temperature range, poor seal strength, and poor flexural resistance. Shibata et al. teach a preferred ethylene/alpha olefin copolymer comprises ethylene/octene-1 copolymer because it does not show the problems encountered with conventional low-density polyethylenes (Column 1, line 15 to Column 2, line 20). Therefore, it would have been obvious to modify Pockat et al. and include ethylene/octene-1 polymer since Shibata et al. teach ethylene/octene-1 copolymer overcomes the problems with sealing and flexural properties of conventional low density ethylene/alpha olefin copolymers.

(10) Response to Argument

On page 12 of the appeal brief, appellant argues that when considering the limiting language of the sealant layer, any significant amount of polybutene in the sealant layer can be reasonably expected to materially affect the basic and novel characteristics applicant's invention. While appellant makes this argument, appellant does not present any evidence to show that the presence of polybutene in the sealant layer affects the characteristic of the layer. There is no indication in the specification that the presence of polybutene affects the sealant layer. In fact, page 9, line 9 of the specification discloses "the sealant layer comprises or preferably consisting essentially of". This language indicates that the sealant layer contains other material and there is no evidence to show that the presence of polybutene will materially affect the sealant layer. Section 2111.03 of the MPEP states "for the purposes of searching and applying prior art and absence a clear indication in the specification or claims of what the basic and novel characteristics are, consisting essentially of is construed as equivalent to comprising. Thus, the claims do not exclude the polybutene disclosed in Pockat et al. The examiner agrees with

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appellant that the language comprising in connection with the bottom web relates to the construction of the bottom web and is not an issue concerning the sealant layer. The language "consisting essentially of" is only related to the sealant layer.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Lien Tran

Lien Tran
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PRIMARY EXAMINER
Group 1700

Conferees:

Milton Cano

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Kathryn Gorgos

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